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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ERVIN ROLANDO MARTINEZ-AGUILAR, Defendant and Appellant.	A153809 (Marin County Super. Ct. No. SC200969)

Following a jury trial, defendant Ervin Rolando Martinez-Aguilar was convicted of possession for sale of methamphetamine and cocaine. He brings this appeal on the ground that the lower court erred by failing to provide a unanimity instruction on the possession for sale charges. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of May 10, 2017, Tiburon Police Department Officer John Gomez and a fellow officer stopped defendant for Vehicle Code violations while driving his Toyota Corolla with a suspended registration. Defendant was driving alone. He could not provide Officer Gomez with his license, registration, or proof of insurance. Instead, he produced a consulate card from Guatemala. After learning defendant was on probation with a search condition, Officer Gomez searched defendant and his vehicle. The search revealed several bindles of methamphetamine and cocaine. Based on the search, defendant was charged with possession of methamphetamine for sale (Health & Saf. Code, § 11378 (count 1)); possession of cocaine for sale (*id.*, § 11351 (count 2)); two counts of driving while the privilege had been suspended or revoked (Veh. Code,

§§ 14601.2, subd. (a); 14501.1, subd. (a) (counts 3 & 5)); and driving while the privilege had been suspended or revoked for refusing to take a chemical test or driving with an excessive blood-alcohol level (Veh. Code, § 14601.5, subd. (a) (count 4)). Defendant pleaded guilty to counts 3 through 5, and stood trial on both possession with intent to sell charges. The following facts were adduced at trial.

The Prosecution's Case

Officer Gomez testified about his search of defendant and the vehicle. He located what appeared to be a firearm behind the driver's seat. The object was later determined to be a compressed BB gun. He then searched the glove compartment and found four small bindles of methamphetamine. The bindles were made of small black squares of thin plastic sealed with twist ties. The glove compartment also contained approximately $20 in $1 and $5 bills. In the trunk, Officer Gomez found a small cardboard box that contained 16 individually wrapped packages of drugs similar to those that he had found in the glove compartment. He did not find any paraphernalia typically used to smoke methamphetamine inside defendant's vehicle. Defendant was arrested.

When Officer Gomez returned to the police station, he began processing the evidence. He noticed that some of the drugs were packaged in colored plastic. The colored bindles contained cocaine. Altogether, Officer Gomez recovered 15 black bindles of methamphetamine and five colored bindles of cocaine from defendant's car. Each package weighed approximately .2 grams, inclusive of the packaging but without the zip ties.

On cross-examination, defense counsel noted that Officer Gomez's body camera footage showed only three black plastic baggies being recovered from the glove compartment. Officer Gomez explained that he got the fourth bindle of methamphetamine "from the cabin somewhere, so it should have been in the glove compartment." Upon being shown a photograph of items that were reportedly found in the passenger cabin (Defendant's Exhibit B), which included the BB gun and three black bindles and one blue bindle, Officer Gomez testified that the fourth bindle in the glove

compartment could have been blue and not black. However, he remembered it as being black.

Inspector Selma Tijero of the Marin County District Attorney's Office testified that she conducted a forensic download of the data on defendant's cell phone. She opined that text messages found on the phone indicated he was selling drugs. In one exchange, defendant told "Riki" that he could "only get it for a hundred." Riki responded that he or she only had "20," and defendant said he would be there in 20 minutes. In another exchange, "Javier" gave defendant an address and told him to bring "Perico," a slang word for cocaine, and he would "pay" him for it. There were also messages containing references to "crystal." Officer Tijero explained "crystal" is a slang word for methamphetamine.

Detective Mark Reischel testified as an expert in the area of possession for sale of methamphetamine and cocaine. He opined that defendant possessed the cocaine and methamphetamine for sale based on several factors. He stated that it is common for drug dealers to package methamphetamine and cocaine in .2-gram bindles that are sold in street-level deals for about $20 a bindle. The large amount (20 bindles) of cocaine and methamphetamine in his possession suggested an intent to sell. Drug dealers will often keep real or replica handguns for protection. The absence of paraphernalia was significant because individuals who are addicted to methamphetamine will need to have the means to ingest it. Detective Reischel opined that the text messages obtained from defendant's phone described drug-related transactions. He also stated it is not uncommon to keep a small amount of narcotics in a vehicle's passenger compartment for easy access. The rest of the drugs are kept in the trunk so that the entire supply will not be lost in case of a drug rip-off.

The Defense Case

Defendant testified on his own behalf. He admitted the drugs that Officer Gomez found in the glove compartment were his. He stated that he used cocaine and methamphetamine recreationally with his friends, and had purchased the drugs five days before his arrest. At that time, he bought eight bindles, five of methamphetamine and

three of cocaine. The four bindles in the glove compartment were what remained from that purchase. He also admitted that he lied to Officer Gomez when he claimed that the drugs were not his, explaining he was afraid because he was on probation at the time.

Defendant testified he had no knowledge of the bindles that Officer Gomez found in his trunk. He explained that he bought the eight bindles from a group of dealers. One of the dealers had asked if he could store a painter's breathing mask in the trunk and defendant told him that "wasn't a problem." Another dealer placed the mask in the trunk along with a small box, which defendant assumed contained a filter for the mask. After going to a bar with two of the dealers, he dropped them off. They did not retrieve the mask or the box from the trunk, and defendant never opened the cardboard box in his trunk. He did not tell Officer Gomez who had put the box in his trunk because he was afraid of retribution.

As to the text messages on his cell phone, defendant claimed they did not involve drug sales. Instead, they related to sharing his drugs with friends and to borrowing money. "Riki" is a relative who texted defendant asking him to buy $20's worth of drugs for him. Defendant responded that he normally buys drugs for $100 at a time, but as a favor he would get him $20's worth. During closing argument, defendant's counsel argued that defendant was guilty only of simple possession of methamphetamine.

Verdict and Sentencing

In discussions between the trial court and counsel regarding jury instructions, the prosecution and defense both indicated they were not asking for CALCRIM No. 3500, the unanimity instruction.[1] The court acknowledged on the record the parties' agreement to remove CALCRIM No. 3500. After closing arguments, the jury found defendant guilty of counts 1 and 2. The trial court imposed a sentence of three years eight months,

[1] CALCRIM No. 3500 provides: "The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

with eight months to be served in county jail and three years on mandatory supervision. This appeal followed.

DISCUSSION

Defendant argues the trial court committed reversible error when it failed to instruct the jury sua sponte that it must agree unanimously on the specific criminal acts underlying the drug charges against him. Because the two charged crimes, possession of methamphetamine and cocaine with intent to sell, could have been satisfied by defendant's possession either in the glove box or the trunk of his car, and because he presented different defenses as to the drugs found in the two locations, defendant contends he was entitled to the unanimity instruction. We are not persuaded.

A criminal defendant has a constitutional right to a unanimous jury verdict. (Cal. Const., art. I, § 16.) " Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "The duty to instruct on unanimity when no election has been made rests upon the court sua sponte." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) Even when the defendant does not request a unanimity instruction, "such an instruction must be given sua sponte where the evidence adduced at trial shows more than one act was committed which could constitute the charged offense, and the prosecutor has not relied on any single such act." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275.)

"The [unanimity] instruction is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.) But a unanimity instruction need not be given when a defendant's "acts are so closely connected that they form part of one and the same transaction, and thus one offense." (*People v. Thompson* (1984) 160 Cal.App.3d 220, 224; see *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1198 [unanimity instruction not required when the evidence

shows only one criminal act].) We review such a claim of instructional error de novo. (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838.)

People v. Wright (1968) 268 Cal.App.2d 196 informs our conclusion that no unanimity instruction was required here. The defendant was sitting with friends in a car parked near the edge of a cliff overlooking the ocean. (*Id*. at p. 197.) When police arrived, one of the friends jumped out of the car and threw 10 to 15 marijuana joints over the bluff. (*Ibid*.) Officers found three marijuana joints in the car, and the following day, two more were found on the face of the cliff. (*Ibid*.) Following the defendant's conviction for marijuana possession, he argued on appeal that the trial court was required to instruct the jury that in order to find him guilty they all had to agree he possessed either the three joints in the car, the two on the cliff, or both. (*Id*. at p. 198.) In rejecting this argument, the court concluded "it was not necessary to instruct the jury its members must all agree which specific items of narcotics [the defendant] possessed so long as they all agreed at the time and place he possessed, separately, jointly or constructively, a usable amount of marijuana." (*Ibid*.) All of the marijuana came from the same car and "[t]he act of possession . . . was not fragmented as to time or space." (*Ibid*.)

Here, too, the acts of possession underlying counts 1 and 2 were part of one transaction and were not fragmented as to time or space. There were not two distinct criminal acts. The drugs found in the glove compartment and in the trunk were located during the same search at the same time. The bindles were similarly wrapped and were located a very short distance apart within the same vehicle. Defendant was the sole occupant of the vehicle and its registered owner. He alone was in constructive possession of all the methamphetamine and cocaine in his car at the time of his arrest.

In addition, the case was presented to the jury as a single criminal act. The prosecutor's closing argument made clear the relevant charges were based on the totality of drugs found in the vehicle: "The defendant is guilty, ladies and gentlemen, there's no other reasonable explanation for the evidence in this case. He has 20 baggies of methamphetamine and cocaine. He had no indicia of personal use. He had money, he had a fake gun, and then his text messages show that he was engaged in the sale of

drugs." Thus, for counts 1 and 2, the prosecution presented the case as a single act of possession based on all the methamphetamine and cocaine found in the vehicle and other indicia of drug trafficking, and the jury would have understood the case in that way. Under the circumstances, there was no reasonable likelihood a juror based his or her verdict solely on the drugs found in the glove compartment, or solely on the drugs found in the trunk.

In arguing that the trial court had a sua sponte duty to give a specific unanimity instruction, defendant relies on a trio of cases: *People v. King* (1991) 231 Cal.App.3d 493 (*King*), *People v. Castaneda* (1997) 55 Cal.App.4th 1067 (*Castaneda*), and *People v. Crawford* (1982) 131 Cal.App.3d 591 (*Crawford*). *Castaneda* held a unanimity instruction is required when the evidence shows several "acts of possession [that are] factually distinct" and the defendant "offer[s] separate defenses to each act," but the prosecution does not elect to rely on a particular act. (*Castaneda*, at p. 1071.) *King* similarly held a unanimity instruction is required "where actual or constructive possession is based upon two or more individual units of contraband reasonably distinguishable by a separation in time and/or space *and* there is evidence as to each unit from which a reasonable jury could find that it was solely possessed by a person or persons other than the defendant." (*King*, at p. 501, italics added.) *Crawford* reversed a conviction for firearm possession where the trial court failed to give a unanimity instruction. (*Crawford*, at p. 600.) Defendant's arguments fall short because no evidence indicated that anyone other than defendant possessed the methamphetamine and cocaine in question at the time of his arrest, and the existence of separate defenses as to items of contraband does not, by itself, compel a unanimity instruction.

In *King*, *supra*, 231 Cal.App.3d 493, the defendant was convicted of possession of methamphetamine for sale after usable quantities of the drug were found in separate locations of the defendant's home, in a purse in the living room and in bags concealed inside a decorative ceramic statue in the kitchen. (*Id*. at p. 498.) The defense presented evidence and argument that the methamphetamine in the purse belonged to another woman who was detained after attempting to flee the scene, and the methamphetamine in

the kitchen belonged to the defendant's boyfriend. (*Id*. at pp. 497–499.) *King* held a unanimity instruction was required because "there was a separation of the contraband by space *and there was conflicting evidence as to the ownership of the narcotics themselves*." (*Id.* at p. 501, italics added.)

In *Castaneda*, *supra*, 55 Cal.App.4th 1067, the defendant was convicted of possession of heroin. (*Id*. at p. 1069.) Police found heroin in the defendant's coin pocket and on the back of a television set in his ex-wife's house where he no longer lived. (*Id*. at pp. 1069–1070.) The defendant offered separate defenses for each quantity, asserting the heroin found in his coin pocket was planted or fabricated and the heroin found behind the television belonged to his son. (*Id*. at p. 1071.) Since the "acts of possession were factually distinct" and the defendant "offered separate defenses to each act," the court ruled a unanimity instruction was required. (*Id.* at p. 1071.)

Finally, in *Crawford*, *supra*, 131 Cal.App.3d 591, the defendant was charged with possessing a firearm by an ex-felon. (*Id.* at p. 593.) In the defendant's bedroom, the police found a handgun in his closet and another handgun holstered at the foot of his bed. (*Id*. at p. 594.) The defendant's girlfriend testified that the gun in the closet was hers, and she and the defendant both testified they had never seen the firearm holstered to their bed. (*Id*. at p. 595.) In rebuttal, the prosecution introduced evidence that two more firearms had been found in an upstairs bedroom in which a third person was sleeping. (*Id*. at pp. 594–595.) The appellate court explained that "where the acts [of possession] were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury's understanding of the case." (*Id.* at p. 599.) However, under the circumstances, the possession of the guns "was fragmented as to space" and there were "unique facts surrounding the possessory aspect of each weapon." (*Ibid*.)

It is true that the defendants in *King*, *Castaneda*, and *Crawford* presented separate defenses to acts of possession, but that was not the sole basis for a duty to instruct on unanimity. In *King* and *Crawford*, the separate defenses were not even cited as reasons for the instruction. Rather, the duty to provide a unanimity instruction in these cases all

stemmed from acts of possession that were fragmented as to space or time and involved conflicting questions of ownership or possession of the contraband. As discussed *ante*, these considerations are absent from the record before us. The methamphetamine and cocaine bindles in this case were not separated by space or time, they were discovered in the same law enforcement search, and there is no evidence that the drugs were in the possession of anyone other than defendant at the time of his arrest. Accordingly, the trial court had no sua sponte duty to give a unanimity instruction.

Even if such an instruction were required, we would conclude the trial court's failure to give it was harmless. "The erroneous failure to give a unanimity instruction is harmless if disagreement among the jurors concerning the different specific acts proved is not reasonably possible." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 119 & fn. 8 (*Napoles*) [split in authority whether such error is reviewed under *Chapman v. California* (1967) 386 U.S. 18, 24 or *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of prejudice; error harmless under either standard].) Further, "[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless." (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.)

The evidence against defendant was substantial. The discovery of usable quantities of methamphetamine and cocaine, individually weighing .2 grams each and wrapped in the same plastic bindles and plastic ties, a BB gun for defendant's protection, numerous text messages on defendant's cell phone indicating defendant was selling drugs to various individuals, and the absence of any drug paraphernalia, all pointed to defendant possessing these drugs with the intent to sell them. Conversely, the defense was weak. Defendant testified that the four drug bindles found in the glove compartment were for personal consumption only, not for sale, and he was not aware that drug dealers had surreptitiously placed a box with 16 bindles of methamphetamine and cocaine in the trunk of his car, and he drove around with the box for five days until he was arrested. Neither defense theory was supported by any evidence other than defendant's own

self-serving testimony. The guilty verdicts indicate the jury resolved the basic credibility dispute against the defendant and accepted the officers' testimony and evidence. Thus, the failure to give the unanimity instruction was harmless. (*Napoles*, *supra*, 104 Cal.App.4th at p. 120 [failure to give unanimity instruction was harmless when credibility was the main issue in the case].)

DISPOSITION

The judgment is affirmed.

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Sanchez, J.

WE CONCUR:

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Humes, P. J.

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Banke, J.